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In The

Supreme Court of the United States

October Term, 1993

STATE OF SOUTH DAKOTA, BY AND THROUGH THE DEPARTMENT OF SOCIAL SERVICES EX REL. GAIL A. DOTSON, IN HER OWN BEHALF AND ON BEHALF OF JARED DOTSON, A MINOR CHILD,

Petitioner,

v.

MERYL D. SERR,

Respondent.

On Petition For Certiorari To The Supreme Court Of The State Of South Dakota

RESPONDENT'S BRIEF IN OPPOSITION

WALLY EKLUND
JOHNSON, EKLUND, NICHOLSON, DOUGHERTY & ABOUREZK
P.O. Box 149
Gregory, SD 57533
Telephone (605) 835-8391

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether This Court Should Consider A Constitutional Issue Not Raised Before Or Decided By The South Dakota Courts When The Question Raised Is Not One Which Presents An Important Federal Question?

II. Whether the South Dakota Supreme Court's Holding In *State v. Serr* Conflicts With Any Decisions Of This Court?

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JURISDICTIONAL STATEMENT

The Respondent suggests that jurisdiction by this Court can not be evoked pursuant to the provisions of 28 U.S.C. § 1257(a).

Specifically, the Respondent disputes that the present issue is properly before this Court as it was never presented or argued to either the South Dakota trial court or the South Dakota Supreme Court and, therefore, the state courts were not afforded a fair opportunity to address the federal question that is sought to be determined here. Additionally, the Respondent urges that, respectively, the present issue does not raise an important federal question.

SUMMARY OF THE ARGUMENT

The Respondent, Meryl Serr, respectfully prays that this Court deny the State of South Dakota's petition for a writ of certiorari in the matter of *State of South Dakota ex rel. Dotson v. Serr*, 506 N.W.2d 421 (S.D. 1993) [hereinafter *State v. Serr*], a judgment and opinion issued by the Supreme Court of the State of South Dakota on October 6, 1993.

The Respondent contends that review of this opinion is not proper because jurisdiction pursuant to 28 U.S.C. § 1257 is not established where the South Dakota state courts did not have a fair opportunity to address the constitutional question sought to be reviewed and where the record establishes that the question raised is not, relatively, an important issue of federal concern. The

Respondent alternatively asserts that the South Dakota Supreme Court's holding in *State v. Serr* does not conflict with any prior decision of this Court.

STATEMENT OF THE CASE

A. Relevant Statutory Provisions

A wholly discretionary statute, 28 U.S.C. § 1257(a) provides in relevant part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States.

In addition, South Dakota law regarding the appropriate scope of review in its appellate system is relevant here. Pursuant to South Dakota's rules of appellate procedure, parties seeking review in the South Dakota Supreme Court shall provide to the court:

> a concise statement of the legal issue or issues involved, omitting unnecessary detail. Each issue shall be stated as an appellate court would state the broad issue presented. Each issue shall be followed by a concise statement of how the trial court decided it.

SDCL § 15-26A-60(4). An appellee need not reply to the appellant's statement of the issues " . . . unless the appellee is dissatisfied with the statement of the appellant." SDCL § 15-26A-61.

Additionally, an appellate party may petition for rehearing before the South Dakota Supreme Court within twenty days after a decision:

> The petition shall state briefly the ground upon which a rehearing is asked and the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the printed record and the authorities relied upon.

SDCL § 15-30-4.

Finally, the statutory provision now challenged by the State comes from a version of SDCL § 25-8-9 which was in effect in 1978. At that time, SDCL § 25-8-9 provided as follows:

> Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

(*See* former SDC 1939 § 37.2131)

In 1983, South Dakota amended this statute to read as follows:

> Proceedings to enforce the obligation of the father may not be brought after the lapse of more than six years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

(1983 S.D. Sess. L., ch. 207, § 2).

In 1986, SDCL § 25-8-9 underwent further change:

> Proceedings to establish paternity and enforce the obligations of the father may be brought at any time prior to the eighteenth birthday of the child. The provisions of this section apply to all children who have been born since July 1, 1968.

(1986 S.D. Sess. L., ch. 218, § 57).

A final change to SDCL § 25-8-9 was wrought in 1989 when the legislature deleted the retroactive language so that the present South Dakota statute reads as follows:

> Proceedings to establish paternity and enforce the obligations of the father may be brought at any time before the eighteenth birthday of the child.

(1989 S.D. Sess. L, ch. 222).

Salient to this final statutory revision is SDCL § 2-14-21, which addresses the issue of retroactive application of statutes in South Dakota courts. That statute provides:

> No part of the code of laws enacted by § 2-16-13 shall be construed as retroactive unless such intention plainly appears.

B. Opinions Below

The procedural history underlying this paternity action is somewhat lengthy, though not difficult. The State of South Dakota instituted an action for paternity against the Respondent, Meryl Serr, on May 17, 1991 on behalf of a Pennsylvania citizen, Gail Dotson, and her thirteen year-old son. Serr, making a special appearance, moved to dismiss the action based upon a statute of

limitations defense. Following a hearing on the motion on July 27, 1991, the trial court altered its bench ruling and entered Findings of Fact and Conclusions of Law and an Order denying Serr's motions to dismiss. (Petitioner's Appendix, A-21; A-29, A-31)

The matter proceeded to trial on April 20, 1992. At no time was the issue raised by the State in this petition presented to the trial court. The trial court entered its Findings of Fact and Conclusions of Law and a Judgment of Paternity and Support, determining Mr. Serr to be the child's biological father on May 12, 1992. (Petitioner's Appendix, A-32; A-43)

On June 12, 1992, further proceedings were heard before the trial court to establish the appropriate amount of support. Following that hearing, the trial court entered separate Findings of Fact and Conclusions of Law and an Amended Judgment of Paternity and Judgment of Support. (Petitioner's Appendix, A-46; A-54) Notice of Entry was given on June 29, 1992. Mr. Serr appealed.

In the meantime, the trial court entered a Second Amended Judgment of Paternity and Order of Support, dated July 8, 1992. (Petitioner's Appendix, A-58) Notice of Entry of the Second Amended Judgment for Paternity and Support was given on July 9, 1992. Serr renewed his appeal pursuant to South Dakota's appellate procedure, arguing that South Dakota law did not permit retroactive application of statutes absent an express legislative intention.

The matter was briefed and argued to the South Dakota Supreme Court. On October 6, 1993, the South Dakota Supreme Court issued its opinion, reversing the

trial court and holding that the present version of SDCL § 25-8-9 is not retroactive. *State v. Serr*, 506 N.W.2d at 423. Thereafter, the State of South Dakota petitioned this Court for its writ of certiorari to review that judgment on a constitutional issue that it failed to properly present before either of the South Dakota courts. The Respondent, Meryl Serr, respectfully requests that this Court decline the State's petition.

STATEMENT OF THE FACTS

The following facts are not contested. On June 6, 1978, Gail Dotson gave birth to a child out-of-wedlock. From that time to the present, Ms. Dotson and her child have been Pennsylvania residents. According to Ms. Dotson, she became pregnant while living in Nevada in 1977, where she became acquainted with the respondent, Meryl Serr, and began to have sexual relations with him. Ms. Dotson also admits that during this same time-frame, she had intercourse with another man.

For reasons not revealed by this record, Ms. Dotson hesitated some thirteen years before naming a putative father for the child. In 1988 or 1989, she sent a letter with a picture of the child enclosed to Mr. Serr at his South Dakota address, indicating her belief that he was the child's father. The receipt of this belated birth announcement was the first indication Mr. Serr had of either Ms. Dotson's pregnancy or the subsequent birth. Consequently, he had neither been adjudicated to be the father, nor had he acknowledged paternity or offered support for the child.

When Ms. Dotson began to receive Aid to Dependent Children in December, 1989, she applied for child support services under Pennsylvania's Revised Uniform Reciprocal Enforcement of Support Act. Once a Pennsylvania court determined that Mr. Serr could owe a duty of support, a paternity petition was initiated in South Dakota circuit court to establish paternity and compel support on May 17, 1991.

Mr. Serr responded to the paternity complaint by asserting that the statute of limitations to bring the action against him had run. As discussed above, Mr. Serr made a special appearance at a hearing to determine the viability of this defense and the trial court ultimately rejected Mr. Serr's statute of limitations defense,[1] specifically finding that the South Dakota legislature intended the 1989 version of SDCL § 25-8-9 to apply retroactively.

(Petitioner's Appendix, A-21 (Conclusion of Law IV)). Significantly, the equal protection argument now espoused by the State was never presented to the trial court. Thereafter, the paternity/support action proceeded, with the trial court ultimately finding that Mr. Serr was the child's father and that this status obligated him to make support for the child. Mr. Serr timely appealed.

On appeal, the South Dakota Supreme Court reversed, holding that the current version of SDCL § 25-8-9 did not have retroactive application. *Serr*, 506

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[1] The trial court ruled from the bench in favor of Mr. Serr, then reversed its position in a brief letter opinion. (Petitioner's Appendix, A-31)

N.W.2d at 423. Importantly, the South Dakota Supreme Court noted that Dotson did not specifically raise any constitutional issues on her own behalf. The South Dakota Supreme Court did not undertake to pursue that issue for her and, therefore, did not decide that particular question. *Id.* at 423.

REASONS FOR DENYING THE WRIT

I.

This Court Should Not Consider A Constitutional Issue Not Raised Before Or Decided By The South Dakota Courts When The Question Raised Is Not One Which Presents An Important Federal Question.

A. The State Failed To Properly Present The Federal Question It Now Advances To The South Dakota State Courts.

The State of South Dakota now argues at length to this Court that SDCL § 25-8-9, as it was in effect in 1978, violated the Equal Protection Clause of the Fourteenth Amendment. It is respectfully submitted that, as a matter of procedural and appellate propriety, this argument comes too late: neither the South Dakota circuit court nor the South Dakota Supreme Court was ever properly presented with this question.

Because this case comes to this Court from the South Dakota state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. As applied to the circumstances of this case, that statute mandates that in the state courts, the petitioner shall "have specially set up or claimed under

the Constitution . . . of . . . the United States" that right which it now seeks to have this Court enforce. 28 U.S.C. § 1257(a).

Likewise, Supreme Court Rule 14(h) requires each petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." A review of this record reveals that the petitioner, the State of South Dakota, failed to raise or preserve a claim of violation of the Equal Protection Clause of the Fourteenth Amendment in the South Dakota courts: the question raised here simply was not decided in *State v. Serr*, 506 N.W.2d at 421.

This Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969). *See also Webb v. Webb*, 451 U.S. 493, 496, 101 S.Ct. 1889, 1892, 68 L.Ed.2d 392 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352, 92 U.S. 998, 999, 35 L.Ed.2d 346 (1973); *Moore v. Illinois*, 408 U.S. 786, 799, 92 S.Ct. 2562, 2570, 33 L.Ed.2d 706 (1972); *Stanley v. Illinois*, 405 U.S. 645, 658 n.10, 92 S.Ct. 1208, 1216 n.10, 31 L.Ed.2d 551 (1972); *Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971); *University of California Regents v. Bakke*, 438 U.S. 265, 283, 98 S.Ct. 2733, 2744, 57 L.Ed.2d 750 (1978).

"Questions not raised below are those on which the record is likely to be inadequate since it certainly was not compiled with those questions in mind," *Cardinale*, 394

U.S. at 438, 89 S.Ct. at 1163. The Court's jurisdictional reservation was more fully explained by the Court in a latter case as follows:

> . . . [T]here are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute . . . be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

Webb v. Webb, 451 U.S. at 500, 101 S.Ct. at 1983. These considerations include a respect for the principles of comity[2] as well as practical reasons which permit state courts to exercise their authority to construe state statutes, insure that independent state grounds will be identified and acted upon in an authoritative manner by state courts, and require litigants to adequately prepare and present claims to state courts where the issue may be disposed of in a manner that obviates any reason for unnecessarily consuming the Supreme Court's time and effort. *Webb*, 451 U.S. at 500, 101 S.Ct. at 1894. In short, proper presentation of federal questions in the first

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[2] Historically, the "federal-state comity" policy stems from the exhaustion-of-state-remedies doctrine applicable to federal habeas corpus review of the constitutional claims of state prisoners which has been adhered to as a means to allow state courts the first instance to correct constitutional violations. *See Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971).

instance preserves this Court's resources for cases which are truly ready and important enough to review.

Of course, this rule has never been applied with inflexible specificity. At the very minimum, however, "there should be no doubt from the record that a claim under . . . the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law." *Webb*, 451 U.S. at 500, 101 S.Ct. at 1894.

Consider, for example, the result in *Webb v. Webb*. The Petitioner there sought review of a Georgia Supreme Court decision that she alleged failed to give full faith and credit to a Florida custody decree. *Webb*, 451 U.S. at 493, 101 S.Ct. at 1890. The Court granted a writ of certiorari, only to discover later that the petitioner had not properly presented the issue regarding the application of the Full Faith and Credit Clause of the Federal Constitution to the Georgia courts; instead, the record revealed that the petitioner had merely used the phrase "full faith and credit" at several points in the proceedings below. *Webb*, 451 U.S. at 496, 101 S.Ct. at 1891. Thus, where the Georgia Supreme Court "neglected to pass on the import of the federal Full Faith and Credit Clause," *Webb*, 451 U.S. at 504, 101 at 1897 (MARSHAL, J., dissenting), this Court concluded that it did not have jurisdiction to hear the case due to the petitioner's failure to properly raise the question in the state court proceedings. *Webb*, 451 U.S. at 500, 101 S.Ct. at 1894.

Indeed, that is an immediate distinction between the present petition and the cases cited by the State as supporting authority. In each of those cases, the record demonstrated that the federal question reviewed had initially been appropriately presented to and decided upon by the respective state courts. *See Clark v. Jeter*, 486 U.S. 456, 460, 108 S.Ct. 1910, 1913, 100 L.Ed.2d 465 (1988) (petitioner specifically argued federal constitutional question to lower and appellate state courts); *Pickett v. Brown*, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983) (same); *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982) (petitioner specifically appealed federal constitutional question to state appellate court).

The State does not suggest that it presented the federal question it now raises to the South Dakota trial court. It did not; instead, the State successfully argued there that the present version of South Dakota's paternity statute should be retroactively applied to Mr. Serr's case. (Petitioner's Appendix, A-31) Mr. Serr appealed to the South Dakota Supreme Court upon the argument that retroactive application of the statute violated *his* due process and equal protection rights. (Petitioner's Appendix, A-80) Though South Dakota appellate procedure provided the State with the opportunity to do so, the State merely responded to Mr. Serr's issues and failed to raise any federal constitutional arguments on its own behalf.[3]

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[3] According to the State's own appellate arguments to the South Dakota Supreme Court, these were the sole legal issues to be addressed:

1. CAN A LEGISLATURE REVIVE A CAUSE OF ACTION FOR PATERNITY BY GIVING THE STATUTE OF LIMITATIONS RETROACTIVE

Though South Dakota procedural law also provides appellate parties an opportunity for rehearing where "points supposed to have been *overlooked or misapprehended* by the court" can be brought to the court's attention for reconsideration, SDCL § 15-30-4, the State did not submit a petition for rehearing to the South Dakota Supreme Court before seeking this Court's writ of certiorari.

The State now argues that its constitutional question was "adequately raised below" by implication through citation to three United States Supreme Court decisions in its appellate brief. However, this is an assumption that the record does not bear out. Specifically, the South Dakota Supreme Court's holding in *Serr* was that SDCL § 25-8-9 does not have retroactive effect. *Serr*, 506 N.W.2d at 423. In *dicta*, the *Serr* court expressly stated: "Dotson did not specifically raise any constitutional issues on her own behalf." *Id.* Thus, there was no consideration of the issue by the South Dakota Supreme Court. Indeed, the South Dakota Supreme Court merely noted, without

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> EFFECT, WITHOUT DENYING A PUTATIVE FATHER DUE PROCESS OF LAW AND EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?
>
> . . .
>
> 2. DOES THE CURRENT VERSION OF SDCL 25-8-9 HAVE RETROACTIVE APPLICATION?

(*See* Petitioner's Appendix, A-100, 101). South Dakota law requires appellate parties provide to the court "a concise statement of the legal issue or issues involved . . . followed by a concise statement of how the trial court decided it." *See* SDCL § 15-26A-60(4); SDCL § 15-26A-61.

explanation, that the State's facts and citations were distinguishable. *Id.* at 423.

B. The South Dakota Courts Did Not Pass Upon The Constitutional Question Posed To This Court.

Rather than direct the Court's attention to the fact that the present issue was never even identified as an issue before the South Dakota Supreme Court, the State posits that the South Dakota Supreme Court simply rejected the constitutional argument that it now advances. (Petitioner's Brief, p. 10) However, its analysis assumes too much, for it assumes that South Dakota Supreme Court must consider any issues implied by the parties on appeal.

Clearly, the South Dakota Supreme Court is under no obligation to consider issues not properly raised by the parties, whether constitutional in nature or not. Under South Dakota law, failure to properly identify the issues to be considered on appeal is a waiver of all issues not raised, briefed and argued. SDCL §§ 15-26A-60, 15-26A-61. *See Graham v. State*, 328 N.W.2d 254, 255 n.2 (S.D. 1982); *Application of Northwestern Bell Telephone Co.*, 326 N.W.2d 100, 104 (S.D. 1982). Thus, the South Dakota Supreme Court has consistently held that the constitutionality of a statute will not be considered where raised for the first time on appeal. *See e.g., M.S. v. Dinkytown Day Care Center, Inc.*, 485 N.W.2d 587 (S.D. 1992) (equal protection argument raised on appeal by abused minors declined because not presented to trial court); *Sharp v. Sharp*, 422 N.W.2d 443 (S.D. 1988) (refusing to consider

the constitutional question raised at the appellate level where the issue was not thoroughly submitted to the court). *See also Carr v. Core Industries*, 392 N.W.2d 829 (S.D. 1986); *Bayer v. Johnson*, 349 N.W.2d 447 (S.D. 1984); *Mayrose v. Fenrich*, 347 N.W.2d 585 (S.D. 1984).

In addition to specific appellate procedure statutes, the South Dakota Supreme Court has explained its judicial reservation in *Sharp v. Sharp* as follows:

> For an appellate court to consider an issue and make a decision on an incomplete record on questions raised before it for the first time would, in many instances, result in injustice, and for that reason courts ordinarily decline to review questions raised for the first time in the appellate court.

Sharp, 422 N.W.2d at 445. The South Dakota Supreme Court has also noted that this general rule of appellate procedure is not applied where the court is faced with "a compelling case" and where an issue is as "thoroughly" presented to the appellate court as it could have been presented below. *Id.* at 466.

The South Dakota Supreme Court was not convinced that either exception to the general rule applied here. The record does not support a claim that this was a compelling case. For example, the South Dakota courts were never provided with the statistical information the State cites in its present petition and Mr. Serr has had no opportunity to rebut or question the reliability of those numbers. (*See* Petitioner's Brief, pp. 31 n.7) The statistics

advanced by the State, like the lion's share of its arguments, are not a part of the appellate record.[4]

The State also informs this Court that South Dakota will be threatened by the "potential" loss of funding because of its alleged "noncompliance" with the provisions of the Federal Child Support Enforcement Amendments, 42 U.S.C. §§ 601-666 (1988). (Petitioner's Brief, pp. 31-32) Again, there is absolutely nothing on the record to support this bald assertion. The State also failed to raise the question of whether this federal statute preempted state law. *See e.g., Clark v. Jeter*, 486 U.S. at 460, 108 S.Ct. at 1913 (declining to review where petitioner failed to adequately raise claim of federal pre-emption by 42 U.S.C. § 666(a)(5) in lower courts).

Like the petitioner in *Webb v. Webb*, the State of South Dakota can only point out fleeting references to the phrase "equal protection" and passing citations to United States Supreme Court cases. However, South Dakota appellate procedure clearly establishes that one can not raise an appellate issue by mere implication. Moreover, the South Dakota Supreme Court has the authority to determine when an issue has been properly raised before it. Here, the court expressly stated that the State had not properly presented a constitutional issue. *Serr*, 506 N.W.2d at 423. In short, the constitutional question

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[4] Note that if the State believed that the South Dakota Supreme Court had overlooked or misapprehended any argument on the record, it could have petitioned to that court for a rehearing.

SDCL § 15-30-4.

argued here was neither fairly raised before or decided by the state courts.

It is uncontested that the *only* issue raised and addressed in the South Dakota Supreme Court in *State v. Serr* was: "DOES THE 1989 AMENDMENT TO SDCL 25-8-9 HAVE RETROACTIVE EFFECT?" *Id.* The holding in *Serr* was limited to the finding that SDCL § 25-8-9 is not entitled to retroactive effect. *Id.* The *Serr* Court did not determine whether South Dakota's former statute is constitutional: that question remains to be developed, presented to and determined by the lower courts in South Dakota before it can rightfully be decided here.

C. The South Dakota Supreme Court's Holding in *State v. Serr* Does Not Raise An Important Federal Question.

The jurisdictional requisites established by Congress in 28 U.S.C. § 1257 grant recognition to the Supreme Court's "finite time" and allow the Court to judge each potential case on not only its own merits, but against all the other cases seeking the Court's review. *See* 28 U.S.C.A. § 1257, D. Siegel, "Commentary on the 1988 Revision" pp. 96-98 (1993). Review by this Court on a petition for certiorari is a matter of judicial discretion rather than a matter of right; review is granted "only when there are special and important reasons therefor." U.S. Sup.Ct. Rule 10.1.

The State can not, especially given the state of this record, demonstrate a compelling or important reason for this court to review the South Dakota Supreme Court's decision in *State v. Serr*, 506 N.W.2d at 421. It implies,

without any support whatsoever on the record, that several thousand children in South Dakota are going to be harmed – indirectly – by the *Serr* decision. First, the State quotes the Court to statistics that it failed to present to the South Dakota courts and speculates that "approximately 8,600 children, (less, of course, any children who have already somehow established paternity) could be harmed by this decision." (Petitioner's Brief, pp. 30-31).

Aside from the fact that this "evidence" is undisputedly *not* on the record, it is facially misleading. Under the lightest examination, it is revealed as meaningless numbers. By its own admission, the State does not know how many children born out-of-wedlock in South Dakota during the identified time period have already established paternity: it is possible that all of the approximately 8,600 children so generally referred to have established paternity. This record is barren of any sort of reference to the numbers of children who could somehow be affected by the *Serr* decision (whether from South Dakota or elsewhere) and that it is too late for the State to submit that evidence now.

Additionally, the State implies that federal funding for its child support programs is in jeopardy because of its alleged noncompliance with the Federal Child Support Enforcement Amendments.[5] It offers even less support for this unadorned claim – and there is even less evidence to support it. In a word, it is sheer speculation.

This Court should determine the relative importance of this question based upon the actual facts and the

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[5] As noted above, the State also failed to raise the preemption issue regarding the provisions of this federal enactment before the South Dakota courts.

record of the case, not suppositions and belated, unsupported statistical information. The record offers no foundation: the State can not actually claim that even one South Dakota child has been or will be affected by its decision in *Serr*.[6] Perhaps the State's present claim that the *Serr* opinion is of great import to a great number of South Dakota children would carry more credence if the State had petitioned for rehearing on this issue before the South Dakota Supreme Court: it did not. In fact, the state of the record and the State's belated efforts to offer some support for its argument that this is an important federal question only emphasize the fact that this argument was never appropriately presented to the South Dakota courts.

II.

The South Dakota Supreme Court's Holding In *State v. Serr* Does Not Conflict With Any Decisions Of This Court.

A. The South Dakota Supreme Court's Holding That An Amended Statute May Not Be Retroactively Applied Does Not Conflict With Any Decision Of This Court.

To effectively discuss whether this case is an appropriate one for Supreme Court review, the actual holding of *State v. Serr* must be emphasized. Contrary to the

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[6] Ms. Dotson and her child are residents of Pennsylvania. Of course, there remains a question of whether the *Serr* decision affects Ms. Dotson's child where it is uncontested that federal legislation may pre-empt South Dakota state law. *See* 42 U.S.C. § 666(a)(5).

State's position, the South Dakota Supreme Court concluded only that an amended statute may not be retroactively applied so as to revive a cause of action previously barred. *Serr*, 506 N.W.2d at 423.

This Court has long-recognized that retroactive legislation, when permissible, is not favored. *Claridge Apt. Co. v. C.I.R.*, 323 U.S. 141, 65 S.Ct. 72, 89 L.Ed. 139 (1944); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, – L.Ed. – (1945). This basic principle has assumed the proportions of horn-book law. According to one source,

> [i]t is well settled and a fundamental rule of statutory construction, variously stated, that all statutes are to be construed as having only a prospective operation, and not as operating retrospectively. It is equally well settled as a fundamental rule of statutory construction supported and established by numerous judicial decisions that statutes are not to be construed as having retroactive effect.

82 C.J.S. § 414.

Consistent with the general rule, South Dakota law specifically addresses the issue of retroactive application of statutes in South Dakota courts. That statute provides:

> No part of the code of laws enacted by § 2-16-13 shall be construed as retroactive unless such intention plainly appears.

SDCL § 2-14-21. Most state courts which have considered the issue of retroactivity of statutes have held that legislation which attempts to revive previously time-barred claims impermissibly interferes with vested rights of the defendant, and thus violates due process. *State of Minn.*

Ex Rel. Hove v. Doese, 501 N.W.2d 366, 369 (S.D. 1993)(citing a legion of supporting cases)[hereinafter *State v. Doese*].

The history of the statute involved in *Serr* indicates that the statute, SDCL § 25-8-9, has undergone substantial change since the birth of the Dotson child in 1978. At that time, a version of SDCL § 25-8-9 provided as follows:

> Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

In 1983, South Dakota amended the legislation to read as follows:

> Proceedings to enforce the obligation of the father may not be brought after the lapse of more than six years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

In 1986, SDCL § 25-8-9 underwent further change:

> Proceedings to establish paternity and enforce the obligations of the father may be brought at any time prior to the eighteenth birthday of the child. The provisions of this section apply to all children who have been born since July 1, 1968.

A final change to SDCL § 25-8-9 was wrought in 1989 when the legislature deleted the retroactive language so that the present South Dakota statute reads as follows:

> Proceedings to establish paternity and enforce the obligations of the father may be brought at

> any time before the eighteenth birthday of the child.

It was this latest version of SDCL § 25-8-9 that the South Dakota trial court applied to the facts of the present case, a legal posture which necessarily required the retroactive application of the statute despite the absence of any legislative approval. *Contra* SDCL § 2-14-21.

At the time that *Serr* was appealed, the retroactive application of SDCL § 25-8-9 was untested in South Dakota. In the interim, however, the South Dakota Supreme Court decided *State v. Doese*, 501 N.W.2d at 366. In *Doese*, the South Dakota Supreme Court was presented with a nearly identical factual scenario in a paternity case. As in *Serr*, the State (this time the state of Minnesota) did not urge the pre-emption of federal laws or raise any equal protection claim. *Doese*, 501 N.W.2d at 366 ("Minnesota and Hove did not . . . claim the statute infringes upon Hove's constitutional rights. Rather, they only allege that the 1989 statute can be applied retroactively."). Though the *Doese* Court did come much closer to addressing the constitutional issue,[7] the *Doese* Court also indicated that the barren state of the record made it difficult. *Doese*, 501 N.W.2d at 371. Thus, the *Doese* Court

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[7] In a dissenting opinion, one justice indicated that he believed the equal protection question should have been considered by the majority. *Doese*, 501 N.W.2d at 371 (WUEST, J., dissenting).

Another dissenting opinion indicated that the 1989 version SDCL 25-8-9 should have been considered retroactively effective. *Id.* at 374 (SABERS, J., dissenting).

also declined to pass upon the constitutional muster of SDCL § 25-8-9.[8]

Finally, a comparison between the cases cited by the State in its petition indicate that the holding in *State v. Serr* is not in conflict with this Court's holdings in *Clark v. Jeter* and *Pickett v. Brown*. First of all, both *Clark* and *Pickett* directly address the issue of an equal protection violation.[9] *Clark*, 486 U.S. 460-64, 108 S.Ct. 1914-16; *Pickett*, 462 U.S. 7-19; 103 S.Ct. 2204-08. On the other hand, *Serr* addresses only the retroactive application of SDCL § 25-8-9 and expressly notes that the equal protection argument was not raised by the State. *Serr*, 506 N.W.2d at 426.

The earlier of the two cases, *Pickett v. Brown*, involved an equal protection challenge to Tennessee's former paternity statute. At that time, its statute provided that a paternity and support action must have been filed within two years of the child's birth unless the father had provided support, had acknowledged his paternity in writing or unless the child was, or was liable to become a public charge, in which case the state or any person could bring suit at any time prior to the child's eighteenth birthday. *Pickett*, 462 U.S. at 3 n.1, 103 S.Ct. at 2201 n.1. It was significant that Tennessee's claim that the interest

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[8] No effort was made to seek a writ of certiorari regarding the *Doese* holding – a procedural failure which also suggests against the compelling nature of the present question.

[9] Pursuant to this Court's holding in *Mills v. Habluetzel*, 456 U.S. at 99, 102 S.Ct. at 1554-55, statutes regarding illegitimate children are treated to intermediate scrutiny when analyzed on equal protection grounds.

advanced by the statute was to prevent stale or fraudulent claims was "seriously undermined" by the fact that if the child were likely to partake of public revenue, the statutory period would be readily extended. *Id.* at 15; 103 S.Ct. at 2207. Thus, the Court concluded that the Tennessee statute violated the Equal Protection Clause, noting " . . . some illegitimate children in Tennessee are treated differently from, and less favorably than, legitimate children." *Id.* at 11; 103 S.Ct. at 2206.

In *Clark v. Jeter*, the Court considered an equal protection challenge to a Pennsylvania statute which barred paternity claims with a six year statute of limitations. As in *Serr*, the retroactive application of an amended statute was addressed – and rejected – by the Pennsylvania courts. *Clark*, 486 U.S. at 460, 108 S.Ct. at 1913. However, there the equal protection argument had clearly been properly raised in the state courts. *Id.*

Upon review, the *Clark* Court outlined the requisites of a statute of limitation for paternity actions:

> First, the period for obtaining support . . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed upon that opportunity must be substantially related to the State's interest in avoiding the litigation of state or fraudulent claims.

Id. at 460, 108 S.Ct. at 1914. The *Clark* Court held that Pennsylvania's statute of limitations violated the Equal Protection Clause, adding that "even six years does not necessarily provide a reasonable opportunity to assert a

claim on behalf of an illegitimate child." *Id.* Note, however, that *Clark* was not decided on that conclusion:

> We do not rest our decision on this ground, however, for it is not entirely evident that six years would necessarily be an unreasonable limitations period for child support actions.

Id. at 464, 108 S.Ct. at 1915.

The primary purpose in enacting a statute of limitations in paternity actions is to protect persons from the burden of litigating stale or fraudulent claims. The "lurking problems" of proving paternity have been frequently recognized by this Court. *Parham v. Hughes*, 441 U.S. 347, 355, 99 S.Ct. 1742, 1748, 60 L.Ed.2d 269 (1979); *Lalli v. Lalli*, 429 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978); *Gomez v. Perez*, 409 U.S. 535, 538, 93 S.Ct. 872, 874, 35 L.Ed.2d 56 (1973). Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy than other. *See Trimble v. Gordon*, 430 U.S. 762, 771, 97 S.Ct. 1459, 1466, 52 L.Ed.2d 31 (1977).

The State correctly asserts that scientific methods of blood testing now make a state's interest in avoiding stale and fraudulent claims more attenuated. *See e.g., Clark*, 486 U.S. at 465, 108 S.Ct. at 1916 (citation omitted) (recognizing that "increasingly sophisticated tests for genetic markers permit the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child."). This, of course, can only be true where such scientific evidence is available. However, in cases where the State offers no scientific evidence of paternity, undeniably, the long-recognized troubles associated with

establishing paternity still exist. Recognizing that scientific evidence is not always at the fingertips of those who seek to establish or deny paternity, South Dakota's statute should not be considered violative of the Equal Protection Clause merely because of the advancement of science in general if the actual practice in South Dakota does not partake of that progress.[10]

Interestingly, in 1989 South Dakota deleted that portion of SDCL § 25-8-9 which authorized retroactive application. The State contends that this earlier version of the statute demonstrates that the legislature, at one time, felt that there was little danger of stale or fraudulent litigation if the statute were to be applied retroactively. Mr. Serr suggests this most recent, critical deletion indicates just the opposite: the legislature amended the statute so that it is no longer retroactive for the purpose of encouraging persons to bring timely claims, while memories are fresh and witnesses are available. Again, the record does not provide any insight into this question.

Pursuant to South Dakota law, specifically SDCL § 2-14-21, the South Dakota Supreme Court correctly held that under South Dakota law, SDCL § 25-8-9 will not be applied retroactively unless an express intention otherwise appears. *State v. Serr*, 506 N.W.2d at 423. This holding does not violate any previous holding of this Court. While there may be more of an issue regarding the constitutional caliber of the 1978 version of SDCL § 25-8-9, that question has yet to be addressed to or by the South

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[10] For example, it would be extremely helpful to have some indication on the record as to how many paternity cases in South Dakota actually utilize scientific evidence.

Dakota courts. Until there is such a determination by the South Dakota court, jurisdiction by this Court is not proper.

CONCLUSION

If the State's presently unsupported assertions are true, the day will not be long in coming before it has another opportunity to prepare a proper record and adequately present its equal protection argument to the South Dakota courts. In the meantime, however, the question should not be wrested away from the South Dakota state courts; nor should this Court's resources be expended on an issue that has yet to be weighed for constitutional validity – tested first on alternative grounds – in the state courts. The State's failure to identify and raise appropriate issues of pre-emption and constitutional merit should not now be construed in its favor so that the South Dakota state courts have no opportunity to test the merit of the claims in the first instance.

For all of the foregoing reasons, the Respondent respectfully requests that this Court deny the State of South Dakota's petition for writ of certiorari.

Respectfully submitted,

WALLY EKLUND
JOHNSON, EKLUND,
NICHOLSON, DOUGHERTY
& ABOUREZK
P.O. Box 149
Gregory, South Dakota 57533
Telephone (605) 835-8391

Counsel for Respondent